

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

EDGAR D. TELESFORD,) Civil Action
) No. 16-819 (CBA)
Plaintiff,)
) ORAL ARGUMENT
vs.)
) Brooklyn, New York
NEW YORK CITY DEPARTMENT OF) Date: January 24, 2018
EDUCATION, et al.,) Time: 2:00 p.m.
)
Defendant.)

TRANSCRIPT OF ORAL ARGUMENT
HELD BEFORE
THE HONORABLE JUDGE CAROL BAGLEY AMON
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

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Proceedings reported by machine shorthand, transcript produced
by computer-aided transcription.

Court Reporter: Annette M. Montalvo, CSR, RDR, CRR
Official Court Reporter
United States Courthouse, Room N375
225 Cadman Plaza East
Brooklyn, New York 11201
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1 (WHEREUPON, commencing at 1:55 p.m., the following
2 proceedings were had in open court, to wit:)

3 THE LAW CLERK: 16-cv-819, *Telesford v. New York*
4 *City Department of Education*, on for oral argument.

5 THE COURT: Do the parties want to state their
6 appearances, please. First, for plaintiff.

7 MR. DUGAN: Daniel Dugan from the Stewart Lee Karlin
8 Law Group for the plaintiff, Edgar Telesford.

9 THE COURT: Good afternoon.

10 MR. DUGAN: Good afternoon, Your Honor.

11 THE COURT: And for the defendant.

12 MS. MARCUS: Natalie Marcus from the New York City
13 Law Department, on behalf of the defendant New York City
14 Department of Education.

15 THE COURT: Good afternoon.

16 Let's just resolve a couple of things. First,
17 Mr. Dugan, you are not proceeding against the individual
18 defendants?

19 MR. DUGAN: That is correct, Your Honor.

20 THE COURT: Okay. So it is just the Department of
21 Education?

22 MR. DUGAN: Yes, Your Honor.

23 THE COURT: All right. Let me see if I can narrow
24 the issues down a little bit further. The law seems pretty
25 clear that you don't have a claim for punitive damages against

1 the municipality. Do you agree with that?

2 MR. DUGAN: Yes, Your Honor.

3 THE COURT: So punitive damages are out?

4 MR. DUGAN: Yes, Your Honor.

5 THE COURT: Also, in terms of a due process
6 violation for 1983, the cases also seem to hold that an
7 article -- the availability of an Article 78 proceeding is
8 your due process, that's your procedural due process.

9 MR. DUGAN: I would argue that --

10 THE COURT: In other words, he could have had an --
11 gone to an Article 78, correct?

12 MR. DUGAN: Well, Your Honor, he can bring a tenure
13 by estoppel claim through a 1983 claim, as I think we have
14 shown here.

15 THE COURT: I know, but you have a procedural --
16 isn't your -- don't you have a procedural due process claim?

17 MR. DUGAN: Yes, Your Honor. He wasn't granted his
18 3020a rights because he wasn't awarded his tenure.

19 THE COURT: But he could have challenged that
20 decision in an Article 78 proceeding, correct?

21 MR. DUGAN: He could have challenged the decision to
22 terminate him through an Article 78 proceeding, if I
23 understand your question correctly?

24 THE COURT: Yes.

25 MR. DUGAN: Yes, Your Honor. That is not the same

1 due process that's afforded to him, should he have been
2 awarded tenure. If he was tenured, he would be protected by
3 education law 3020a in which he would have had an arbitration
4 hearing in front of a 3020a hearing officer.

5 THE COURT: But why --

6 MR. DUGAN: So he would have been afforded
7 additional rights. Had that decision been adverse to him, he
8 could have challenged that in court through an Article 75
9 proceeding challenging the hearing officer's determination.
10 He wasn't given his due process --

11 THE COURT: But he also could have challenged the
12 fact that -- he could have brought all of this estoppel issue
13 up before the Article 78 judge. In other words, once he was
14 terminated -- it was his position he couldn't be terminated,
15 that he couldn't be terminated without a hearing, correct?

16 MR. DUGAN: That is correct, Your Honor.

17 THE COURT: All right. So he could have challenged
18 what they did and said, "Listen, I have gotten tenure, I was
19 supposed to have a hearing," and he could have challenged all
20 of that in an Article 78, correct?

21 MR. DUGAN: Certainly that's a different standard
22 than the 1983 claim that's brought here, and I don't believe
23 they are mutually exclusive, based on the case law.

24 THE COURT: But the whole idea of a 1983 is that you
25 lost property without due process of law, and if the state

1 provides you some process, then you don't have that claim.
2 And the process available to him would have been an Article 78
3 proceeding. Because in an Article 78 proceeding, they could
4 have decided issues of tenure denial and employment
5 determination, correct?

6 MR. DUGAN: Your Honor, it is a much different
7 standard than had he gone through the 3020a process. That's
8 the benefit these teachers get, by receiving tenure.

9 THE COURT: I know. I think you are -- anyhow.
10 All right. Ms. Marcus, you want to stay seated?

11 MS. MARCUS: Yes, Your Honor. Thank you.

12 Well, Your Honor, the defendant Department of
13 Education moves for judgment on the pleadings dismissing the
14 amended complaint for several reasons. The first reason being
15 that plaintiff failed to exhaust his administrative remedies.
16 When he filed the EEOC charge of discrimination, he didn't
17 include a reasonable accommodation claim or any alleged
18 discrimination or retaliation that flowed from that.

19 THE COURT: But how could he have? I mean, that
20 happened after he filed his complaint, right?

21 MS. MARCUS: But there's case law, Your Honor,
22 saying that you can supplement or amend your EEOC charge.
23 And, in fact, plaintiff recognized that in his initial charge.
24 In his one charge he filed, he wrote that "I reserve my right
25 to modify or supplement this charge."

1 THE COURT: But if it is reasonably related to his
2 first charge, why does he have to do that?

3 MS. MARCUS: Well, yes, it is reasonably related,
4 but in this instance we have argued it isn't reasonably
5 related. There's nothing in the charge to put the EEOC on
6 notice that there was a request for reasonable accommodation
7 or any claims of discrimination or retaliation after that
8 request. They would just -- there would be no reason for them
9 to inquire about that line of alleged facts. And, in fact,
10 there's case law saying that, for example, in *Bawa*, where
11 there were claims of denial of promotion and transfers, that
12 while the plaintiff may have claimed that subsequent to filing
13 the EEOC charge there were other denials of transfers of
14 promotions, that the plaintiff needed to modify or supplement
15 or amend the EEOC charge. Similarly here, the plaintiff
16 should have either filed a new charge or supplemented, amended
17 to put the EEOC on notice of these new facts.

18 THE COURT: Well, the charges sort of have to be
19 qualitatively different. He claimed in his original charge
20 that he was discriminated because of disability, he was
21 subject to retaliation, harassment, hostile work environment.
22 Is it really based on a different type of discrimination?

23 MS. MARCUS: Well, in his initial charge he's
24 claiming he was discriminated on the basis of the broken leg,
25 and then later on in the complaint that was filed in court

1 he's claiming an additional claim that he made a reasonable
2 accommodation to the Department of Education, and as a result
3 of that a separate accommodation request was again
4 discriminated against and retaliated against.

5 THE COURT: Do you want -- maybe we can do it claim
6 by claim. Do you want to respond to that?

7 MR. DUGAN: Yes, I do, Your Honor. Thank you.

8 It is reasonably related to that EEOC charge. There
9 was one line of duty injury he suffered, which the DOE was on
10 notice of, and which he included in the EEOC charge. He
11 attaches to that EEOC charge the line of duty injury reports,
12 the medical reports from the DOE. Then he is terminated on
13 December 2, 2014, timely files that EEOC charge in February of
14 2015. So there's approximately two months later.

15 It is when then he is reinstated to his position,
16 briefly, that he seeks accommodations for that same injury
17 that he suffered in his line of duty. The accommodations were
18 things related to him being reinstated by the DOE so that he
19 could go back to work and perform his duties, elevator access,
20 extra time between classes, being able to sit after an hour,
21 again, all related to the leg injury which he claims he was
22 discriminated against by the DOE in that EEOC charge.

23 The Second Circuit, you know, does support that
24 subsequent conduct. They don't state that he needs to amend
25 his charge, but that if it's reasonably related, then that

1 EEOC charge is timely filed and he may pursue those claims
2 that arise from that.

3 THE COURT: I take it that his claim is to the later
4 conduct that he was terminated because he requested
5 accommodations?

6 MR. DUGAN: Yes. And he has a claim that it is
7 retaliatory due to his complaint of disability discrimination
8 in that EEOC charge.

9 THE COURT: All right. You have another argument,
10 Ms. Marcus, about the disability claim itself?

11 MS. MARCUS: Yes, Your Honor. The motion to
12 dismiss, we also argue that plaintiff hasn't stated a claim
13 under the ADA regarding the alleged disability. The case law
14 is clear that you can't have a formulaic recitation, "I
15 suffered X, Y, and Z, and that substantially impaired my
16 ability to engage in a major life activity," which is what
17 occurred in this complaint.

18 The plaintiff alleges in the complaint that as a
19 result of this injury, his major life activities, including
20 walking, running, ascending and descending stairs and bending
21 were substantially limited. And as outlined in the briefing,
22 the case law is clear that such a formulaic recitation is not
23 sufficient.

24 THE COURT: Why is saying that you're substantially
25 limited in walking, why is that formulaic? It is pretty

1 straightforward. "I can't walk."

2 MS. MARCUS: Well, the case law talks -- well,
3 that's a good point, Your Honor, that's saying "I can't walk."
4 That isn't what he's saying in the complaint. He's just been
5 limited, allegedly, in how -- walking. And then he goes on to
6 allege that he's now walking with a cane. And there's some
7 recent case law from the Southern District where if you allege
8 walking with a cane and that it doesn't substantially impair
9 your ability to walk, that's considered a mitigating factor.
10 It doesn't establish a disability.

11 THE COURT: No, but there's a -- we've had this new
12 law, I guess, the ADAAA, and there's a regulation 29 CFR
13 1630.2, that the determination of whether an impairment
14 substantially limits a major life activity shall be made
15 without regard to the ameliorative effects of mitigating
16 measures, which is the cane.

17 MS. MARCUS: Yes, Your Honor.

18 THE COURT: Does that not sort of undermine your
19 argument?

20 MS. MARCUS: It does go towards, you know, whether
21 or not to consider mitigation, but the court, particularly in
22 the Southern District case, in *Telemaque*, I believe took the
23 cane into consideration because the plaintiff wasn't --

24 THE COURT: Which Southern District case is that?
25 *Nieves*?

1 MS. MARCUS: I apologize. I believe it's *Nieves*,
2 yes. And the case law is going towards that walking -- having
3 that as a substantial impairment is a very high burden to even
4 plead in a complaint, that there needs to be more facts than
5 just walking was impaired. There needs to be some allegation
6 of how or what kind of effects it actually has.

7 THE COURT: Doesn't he say he was bedridden for six
8 weeks, was required to use a wheelchair for two months, that
9 he had extensive physical therapy, continued to suffer
10 arthritis and walk with a cane?

11 MS. MARCUS: Yes, Your Honor. But the allegations
12 about the bed rest and the wheelchair only pertains to that
13 brief period of time when he was healing from his broken leg.
14 And case law talks about a broken bone, particularly a broken
15 leg, as the established case law talks about how that is not a
16 disability. Depending on what flows from that, there may be
17 injuries where it is so catastrophic it turns into a
18 disability. But the immediate effects of healing from a
19 broken leg and having limited mobility for a discrete period
20 of time doesn't establish a disability. He's not alleging
21 that he's currently in a wheelchair following, you know, his
22 leg healing. That was immediately after. And then with
23 respect --

24 THE COURT: Don't the new regulations, though, claim
25 that the limitations can last for a much shorter period of

1 time than was the case before the new regulations?

2 MS. MARCUS: Well, the case law cited in our
3 briefing that I believe is relatively new, it's post the
4 revisions to the ADA, talks about how, you know, an
5 intermittent impairment for six months or so or less does not
6 establish a disability. So the allegations about being
7 bedridden and using a wheelchair, it was during a
8 several-month period while he healed up from that.

9 THE COURT: But there's one of those regulations
10 that says the effects of an impairment lasting or expected to
11 last fewer than six months can be substantially limiting, as
12 one of those regulations that has a lot of numbers and even
13 more letters, 1630.2(j)(1)(ix).

14 MS. MARCUS: Well, I, unfortunately, don't have that
15 regulation in front of me, and while I'm sure it is true that
16 there can be impairments when you have this effect for under
17 six months, he's in the complaint alleged that he's no longer
18 dealing with those issues. He's able to walk around. He's
19 not alleging that he would be in a wheelchair to get around
20 the school. He may have during that recovery period something
21 related to that regulation, what you're saying, being
22 disabled, but the case law also talks about how, you know,
23 episodic impairments that is improving doesn't result in a
24 disability.

25 As an example, you mentioned in the complaint that

1 he alleges that he suffers from arthritis. And the case law
2 talks about merely saying you have arthritis isn't sufficient
3 for a disability. He doesn't allege he's in pain from it or
4 takes any type of medication, just merely he has this
5 condition. There's no allegations about the severity of it.
6 And case law post the changes to the ADA have looked at it and
7 said, where the person alleges that they suffered from
8 arthritis and took medication, that that was insufficient to
9 establish a disability. And, here, the plaintiff's complaint
10 doesn't even allege anything beyond "I have arthritis."

11 THE COURT: It says he walked with a cane. He has
12 arthritis and walked with a cane.

13 MS. MARCUS: And that's how we cycle back to the
14 *Nieves* case, where when the individual alleged that he walked
15 with a cane --

16 THE COURT: That seems to be counter to the
17 regulation. That case doesn't seem to recognize the --

18 MS. MARCUS: Setting aside the dispute between the
19 regulation and the case law, even if we put that case to the
20 side, the other case law demonstrates that merely making
21 these --

22 THE COURT: What about perceived disability?

23 MS. MARCUS: So there's also case law that merely
24 putting -- for example, plaintiff argued that defendant was
25 aware that plaintiff broke his leg and that created a

1 perceived disability. But the case law holds that an employer
2 merely knowing that an individual has some type of injury or
3 impairment doesn't mean that they perceive them as disabled.
4 From the documents, the pleadings that plaintiff has submitted
5 to the DOE, it is that he broke his leg while he was at work.
6 There's nothing -- from the DOE's perspective, they were just
7 expecting -- normal course of a broken leg is you heal up,
8 depending on the severity, and you come back. And the case
9 law, just knowing that somebody has some type of injury,
10 doesn't mean that they perceived you as being disabled.

11 THE COURT: All right. Counsel, do you want to be
12 heard?

13 MR. DUGAN: Yes, Your Honor. Thank you.

14 As to the allegation that he has formulaically
15 resuscitated his injuries, plaintiff does go into detail in
16 the amended complaint. As you mentioned, he was bedridden.
17 Again, this wasn't a normal -- this was a severe broken leg.
18 He had a hip-to-toe cast. And then going to the DOE's own
19 actions in perceiving him as disabled, and to the fact that he
20 was actually disabled, they had approved him for line of duty
21 injury leave through the date that -- through January 8, 2015.
22 Well, the first time they moved to terminate him here was
23 December 2, 2014. At that time they didn't find him fit to
24 come back to work. They perceived him as disabled, they did
25 not feel -- their own medical doctors did not feel that he

1 could come back to work at that time. Again, he does go into
2 detail in the amended complaint as to the severity of these
3 injuries, and then he requested the reasonable accommodations
4 to come back to work because of this same broken leg.

5 Again, as you mentioned, under the regulations,
6 which were newly set forth, he has met the pleading
7 requirements at this stage to have a disability or perceived
8 disability when the DOE themselves were treating him as not
9 being able to work, disabled at this time.

10 THE COURT: What was his -- he was a science
11 teacher?

12 MR. DUGAN: I believe so, Your Honor.

13 THE COURT: What he's doing now?

14 MR. DUGAN: He's not working, Your Honor.

15 THE COURT: He hasn't worked since when?

16 MR. DUGAN: It is a little disputed in the facts
17 here, but since the time of the injury, has essentially not
18 been in a classroom since the time of the injury. Then, as
19 you see, he was terminated in December, reinstated for a brief
20 period of time, which I believe defendant disputes, and then
21 we're talking June of 2015 when he was ultimately terminated
22 from the Department of Education.

23 THE COURT: And he hasn't worked since then?

24 MR. DUGAN: He's not, Your Honor. Not in a teaching
25 capacity. And I don't believe any other capacity.

1 THE COURT: Well, you know, we're talking about --
2 assuming -- assume for the moment the case goes forward, what
3 kind of damages are we talking about here?

4 MR. DUGAN: Your Honor, the most --

5 THE COURT: And there's no punitive damages, so
6 we've knocked that out.

7 MR. DUGAN: Understood. Compensatory damages, I
8 mean, he wanted to come back to work with the reasonable
9 accommodations, Your Honor. So reinstatement is obviously the
10 priority here.

11 THE COURT: Oh, he wants to be reinstated now?

12 MR. DUGAN: Yes. He's ready to teach, Your Honor.

13 THE COURT: Oh.

14 MR. DUGAN: That's why he's -- when they reinstated
15 him briefly for that day there, before terminating him again,
16 as the allegations allege, he asked for these reasonable
17 accommodations so he can go back into the classroom.

18 THE COURT: He still needs these reasonable
19 accommodations, or is he better now and he can go back and
20 teach?

21 MR. DUGAN: I believe there would be some
22 accommodation requirement, Your Honor.

23 THE COURT: How old is he?

24 MR. DUGAN: I don't have it off the top of my head,
25 Your Honor. I'm just looking here in his EEOC charge.

1 THE LAW CLERK: He was born in '59.

2 THE COURT: Born in '59?

3 THE LAW CLERK: Yes.

4 MR. DUGAN: Did you say '59?

5 THE LAW CLERK: Yes.

6 MR. DUGAN: That would seem reasonable.

7 THE LAW CLERK: A little shy of 60.

8 THE COURT: What's he doing playing tug of war in
9 a -- how old was he when he was doing this? I thought this
10 was some young person.

11 MR. DUGAN: No, Your Honor. He may have been moving
12 like a young person at that point, but no longer.

13 THE COURT: Is there a possibility this case can be
14 resolved on him being reinstated?

15 MR. DUGAN: I believe when prior counsel from
16 both -- prior law firm and prior counsel from your office had
17 engaged in lengthy settlement discussions, and there was not a
18 resolution that could be met at this point. I believe we --
19 they met with Magistrate Gold over quite a lengthy time period
20 in an attempt to do that and it was not feasible.

21 THE COURT: Do you know whether it is feasible now?

22 MS. MARCUS: Without going into details, it gets
23 awkward in what the settlement talks were, beginning when I
24 was assigned to the case, I talked with Mr. Dugan and asked if
25 there was any modifications to the City's proposal that might

1 result in a settlement, and I haven't received any response.

2 THE COURT: There was a -- let's go off the record
3 for a moment.

4 (WHEREUPON, discussion was had off the record.)

5 THE COURT: All right. I'll reserve decision.

6 Thank you.

7 MR. DUGAN: Thank you, Your Honor.

8 THE COURT: Except with respect to two things. I am
9 going to strike the claim for punitive damages, and I am going
10 to dismiss the 1983 action because I think the Article 78
11 resolves that, the existence of the Article 78 resolves that,
12 and I'll reserve on whether there's an ADA claim.

13 The state claims, your position is simply that he
14 didn't file a notice of claim?

15 MS. MARCUS: Yes, Your Honor, that the plaintiff
16 hadn't filed a notice of claim so all the state and city human
17 rights law claims must be dismissed.

18 MR. DUGAN: To simply respond, notice claims are
19 required to receive --

20 THE COURT: I'm sorry, what?

21 MR. DUGAN: A notice claim is required to receive
22 monetary compensation. Under the state and city human rights
23 law, he would still be entitled to equitable relief on those
24 claims so they should not be dismissed in their entirety.

25 THE COURT: So you agree that the compensatory

1 claims should be dismissed, but not the equitable claims?

2 MR. DUGAN: As to the state human rights law and the
3 city human rights law claim, yes.

4 MS. MARCUS: Well, Your Honor, frankly, it wasn't
5 raised in the papers about that point, it gave me the
6 impression that they were agreeing to dismiss all the state
7 and city human rights laws against the DOE. But, in any
8 event, our position is that all the claims related to state
9 and city human rights laws must be dismissed against the DOE
10 for failure to file a notice of claim.

11 Your Honor, if I may, in their opposition brief, on
12 page 12 it says: Plaintiff acknowledges that a notice of
13 claim was not filed; however, this is a requirement only as to
14 plaintiff's SHRL and CHRL claims against the DOE. It is not
15 required for maintaining a SHRL and CHRL against individual
16 defendants.

17 MR. DUGAN: Yes, Judge, it should have said that it
18 should have only applied to the monetary damages on those
19 claims. It is well established that the notice of claims is
20 only a prerequisite to maintaining an action for monetary
21 damages against the City of New York. That's what your notice
22 of claim does, is puts them on notice that you are asking for
23 money. He's still entitled to equitable relief under those
24 statutes.

25 THE COURT: How is it, in effect, different?

1 MR. DUGAN: Well, the city human rights law --

2 THE COURT: Oh, it is less strict.

3 MR. DUGAN: -- is less stringent. So it does
4 have -- could have an effect.

5 THE COURT: Well, what case says you still remain
6 entitled to equitable relief?

7 MR. DUGAN: I'd be happy to submit one to
8 Your Honor. I don't have one off the top of my head.

9 THE COURT: Are you familiar with this principle?

10 MS. MARCUS: Unfortunately, Your Honor, I am not. I
11 get the impression I will quickly become familiar with the
12 case law on it.

13 MR. DUGAN: I apologize, Your Honor. It is
14 common -- we commonly brief it, but I don't have a case off
15 the top of my head.

16 THE COURT: Well, why don't you write me a letter by
17 the end of the day tomorrow.

18 MR. DUGAN: Thank you, Your Honor.

19 THE COURT: A case you have that supports that.

20 And you can respond by the end of the day on Friday,
21 okay. So he'll do it the end of the day on Thursday --

22 MS. MARCUS: Would it be possible to have until
23 Monday because I have a motion for summary judgment due that
24 same day.

25 THE COURT: Yes.

1 MS. MARCUS: Thank you, Judge.

2 THE COURT: Okay. Thank you.

3 MR. DUGAN: Thank you very much, Your Honor.

4 (WHEREUPON, at 2:49 p.m., the proceedings were
5 concluded.)

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11 **REPORTER'S CERTIFICATE**

12 I, ANNETTE M. MONTALVO, do hereby certify that the
13 above and foregoing constitutes a true and accurate transcript
14 of my stenographic notes and is a full, true and complete
transcript of the proceedings to the best of my ability.

15 Dated this 26th day of January, 2018.

16 /s/Annette M. Montalvo
17 Annette M. Montalvo, CSR, RDR, CRR
18 Official Court Reporter
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